

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

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ESSROC CEMENT CORP.,  
a Pennsylvania corporation, f/k/a Essroc Materials, Inc.,

Plaintiff,

v.

CPRIN, INC., a Michigan corporation,  
d/b/a CPR Indiana, Inc.;  
CP RECYCLING, INC., a Michigan corporation;

Defendants.

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Case No. 1:08-cv-974

HONORABLE PAUL L. MALONEY

**Order**

**Denying As Moot the Defendants' Motion to Dismiss the Original Complaint**

This is a diversity breach-of-contract and tort action. Plaintiff Essroc Cement Corporation formerly known as Essroc Materials, Inc. ("Essroc") filed the original complaint on October 17, 2008 against CPR Indiana, Inc., which does business as CPRIN, and CP Recycling Inc. (collectively "CP" because they are allegedly one entity in practice), Paul Knowlson ("Knowlson", the owner of both companies), and Carol Knowlson, whose relationship to the CP companies and Paul Knowlson is not specified. *See* Original Complaint filed Oct. 17, 2008 ("Comp") ¶¶ 1-6 and 14.

Essroc applied for a temporary restraining order ("TRO") and a preliminary injunction ("PI") on October 28, 2008 and the defendants jointly filed an opposition brief on October 29. Without hearing oral argument, the court denied Essroc's application for a TRO and PI by opinion and order issued November 3, 2008, document #15. *See Essroc Cement Corp. v. CPRIN, Inc. et al.*, No. 1:2008-cv-794, – F. Supp.2d –, –, 2008 WL ----,. \*— (W.D. Mich. Nov. 3, 2008) (Maloney, C.J.).

On November 14, 2008, the defendants filed a motion to dismiss the original complaint under FED. R. CIV. P. 12(b)(6) for failure to state a claim.

On January 13, 2009, Essroc filed the first amended complaint. Because the defendants had not yet filed a responsive pleading,<sup>1</sup> Essroc was entitled to amend its complaint as of right, without leave of court or opposing counsel. *See Rogers v. AK Steel Corp.*, 1998 WL 1753590, \*2 (S.D. Ohio Apr. 16, 1998) (“A party may amend the party’s pleading once as a matter of course at any time before a responsive pleading is served . . . .”) (quoting FED. R. CIV. P. 15(a)); *McCready v. Michigan State Bar Standing Committee on Character & Fitness*, 926 F. Supp. 618, 620 (W.D. Mich. 1995) (McKeague, J.) (“Plaintiff was entitled to file his amended complaint as of right under Fed. R. Civ. P. 15(a), because defendant had failed to file an answer to his original complaint.”), *aff’d o.g.*, 1996 WL 637484 (6<sup>th</sup> Cir. Nov. 4, 1996).

Accordingly, the court accepted Essroc’s first amended complaint for filing.

“‘[O]nce accepted, an amended complaint replaces the original.’” *Malik v. AT&T Mobility, LLC*, 2008 WL 4104555, \*3 (W.D. Mich. Aug. 29, 2008) (Maloney, C.J.) and *ABB, Inc. v. Reed City Power Line Supply Co.*, 2007 WL 2713731, \*1 (W.D. Mich. Sept. 18, 2007) (Maloney, J.) (both quoting *FL Dep’t of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 702 (1982) (White, J., concurring in part & dissenting in part

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“Cases uniformly hold that a ‘responsive pleading’ is solely one of the pleadings mentioned in Rule 7(a) – [such as an answer –] other responses, such as a motion to dismiss or a motion for summary judgment, do not suffice” under Rule 15(a). *PNC Secs. Corp. v. Finanz Liedgens GMBH*, 1996 WL 665574, \*6 (6<sup>th</sup> Cir. Nov. 14, 1996) (citing, *inter alia*, *Kroger Co. v. Adkins Transfer Co.*, 408 F.2d 813 (6<sup>th</sup> Cir. 1969) and *Rogers v. Girard Trust Co.*, 159 F.2d 239 (6<sup>th</sup> Cir. 1947)).

*See, e.g., Wingert v. JPMorgan Chase Bank*, 537 F.3d 565, 574 (6<sup>th</sup> Cir. 2008) (“A motion to dismiss is not considered a responsive pleading under Rule 15(a).”) (citing *Ohio Cas. Ins. Co. v. Farmers Bank of Clay*, 178 F.2d 570, 573 (6<sup>th</sup> Cir. 1949)), *reh’g en banc denied* (Oct. 28, 2008); *Friske v. Scutt*, 2008 WL 4857963, \*1 (E.D. Mich. Nov. 6, 2008) (Hluchaniuk, M.J.) (“Here, defendants have not filed a responsive pleading; rather, they have only filed a motion for summary judgment.”), *order aff’d*, 2008 WL 5211613 (E.D. Mich. Dec. 11, 2008) (Rosen, D.J.).

*Accord Denney v. Nelson*, – F. App’x –, –, 2009 WL 26718, \*3 (11<sup>th</sup> Cir. Jan. 6, 2009) (quoting *Brewer-Giorgio v. Producers’ Video, Inc.*, 216 F.3d 1281, 1284 (11<sup>th</sup> Cir. 2000)).

o.g., joined by Powell, Rehnquist, & O'Connor, JJ.)). The filing of the amended complaint “render[s] the original complaint null and void . . . .” *Malik*, 2008 WL 4104555 at \*3 (quoting *Vadas v. US*, 527 F.3d 16, 22 n.4 (2d Cir. 2007) (adopting party’s quotation from district court decision)). See also *B&H Med., LLC v. ABP Admin, Inc.*, 526 F.3d 257, 268 n.8 (6<sup>th</sup> Cir. 2008) (quoting *Drake v. City of Detroit*, 266 F. App’x 444, 448 (6<sup>th</sup> Cir. 2008) (Suhrheinrich, J.) and citing 6 Wright, Miller & Kane, FED. PRAC. & PROC. § 1476 (2d ed. 1990)).<sup>2</sup>

Because the original “complaint has been superseded and nullified, there is no longer a live dispute about the propriety or merit of [the] claims . . . asserted therein.” *Van Vels v. Betten*, 2007 WL 2461933, \*1 (W.D. Mich. Aug. 27, 2007) (Maloney, J.) (citing *May v. Sheahan*, 226 F.3d 876, 879 (7<sup>th</sup> Cir. 2000) (“If these . . . superseded May’s original amended complaint, the present appeal would be moot because there would no longer be a live dispute over whether Sheahan is entitled to qualified immunity based on the allegations in the Amended Complaint.”))).

Therefore, any motion to dismiss such claims is moot. See *Glass v. The Kellogg Co.*, 252 F.R.D. 367, 368 (W.D. Mich. 2008) (Maloney, C.J.) (citing *Cedar View, Ltd. v. Colpetzer*, 2006 WL 456482, \*5 (N.D. Ohio Feb. 24, 2006) (Aldrich, J.) (the “earlier motion[s] to dismiss . . . are denied as moot, as they refer to a version of the complaint that has since been replaced . . . .”) and *Ky. Press Ass’n, Inc. v. Ky.*, 355

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*Accord Ramallo Bros. Printing, Inc. v. El Dia, Inc.*, 490 F.3d 86, 88 n.2 (1<sup>st</sup> Cir. 2007) (“[Plaintiff’s] amended complaint completely supersedes his original complaint, and thus the original complaint no longer performs any function in the case.”) (citation omitted); *Young v. City of Mt. Ranier*, 238 F.3d 567, 573 (4<sup>th</sup> Cir. 2001); *Swanson v. Perez*, 250 F. App’x 596, 597 (5<sup>th</sup> Cir. 2007) (quoting *King v. Dogan*, 31 F.3d 344, 346 (5<sup>th</sup> Cir. 1994)); *In re Atlas Van Lines, Inc.*, 209 F.3d 1064, 1067 (8<sup>th</sup> Cir. 2000); *Enderwood v. Sinclair Broadcast Group, Inc.*, 233 F. App’x 793, 800 (10<sup>th</sup> Cir. 2007) (quoting *Davis v. TXO Prod. Corp.*, 929 F.2d 1515, 1517 (10<sup>th</sup> Cir. 1991)).

See, e.g., *General Mills, Inc. v. Kraft Foods Global, Inc.*, 487 F.3d 1368, 1376 (8<sup>th</sup> Cir.) (“Kraft had filed a counterclaim to General Mills’ original complaint, but that complaint was superseded by General Mills’ amended complaint, and at the time the district court entered judgment, Kraft had not filed an amended answer re-pleading the counterclaim.”), *clarified on panel reh’g o.g.*, 495 F.3d 1378 (8<sup>th</sup> Cir. 2007).

F. Supp.2d 853, 857 (E.D. Ky. 2005) (“Plaintiff’s amended complaint supercedes the original complaint, thus making the motion to dismiss the original complaint moot.”) (citing *Parry v. Mohawk Motors of Mich., Inc.*, 236 F.3d 299, 306 (6<sup>th</sup> Cir. 2000)), *app. dis.*, 454 F.3d 505 (6<sup>th</sup> Cir. 2006)).<sup>3</sup>

## ORDER

Accordingly, the defendants’ motion to dismiss the original complaint [**docket # 17**] is **DENIED without prejudice as moot.**

**IT IS SO ORDERED** this 20<sup>th</sup> day of January 2009.

/s/ Paul L. Maloney  
Honorable Paul L. Maloney  
Chief United States District Judge

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*See also ComputerEase Software, Inc. v. Hemisphere Corp.*, 2007 WL 852103, \*1 (**S.D. Ohio** Mar. 19, 2007) (“Since the amended complaint replaces the original complaint, the motion to dismiss the original complaint is moot . . . .”); *Weiss v. Astella Pharma US, Inc.*, 2006 WL 1285406, \*1 n.1 (**E.D. Ky.** May 10, 2006) (following amendment, motions to dismiss were moot).

*Accord Professional Locate v. Prime, Inc.*, 2007 WL 1624792, \*5 (**S.D. Ala.** June 4, 2007) (“Leave to Amend . . . is granted. \* \* \* Elliott’s motion to dismiss for lack of personal jurisdiction . . . is now moot because it relates to a superseded complaint . . . .”); *Tatum v. R.J. Reynolds Tobacco Co.*, 2007 WL 1612580, \*4 (**M.D.N.C.** May 31, 2007) (“Because the First Amended Complaint was superseded by the Second Amended Complaint, all other pending motions were denied as moot.”); *Busch v. Williams*, 2007 WL 2254939, \*2 (**N.D. Tex.** Feb. 7, 2007) (“[G]ranting Busch leave to amend effectively moots defendants’ motions to dismiss – which are addressed to a . . . petition that will be superseded . . . .”); *Peebles v. Beneficial Nevada, Inc.*, 2006 WL 3228421, \*1 (**D. Nev.** Nov. 3, 2006) (“Because Plaintiff’s amended complaint supersedes the original complaint in its entirety, *see London* . . . (9<sup>th</sup> Cir. 1981), [the] Motion to Dismiss Plaintiff’s original complaint is moot.”).